

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

IN RE: PHARMACEUTICAL INDUSTRY AVERAGE  
WHOLESALE PRICE LITIGATION

MDL No. 1456

THIS DOCUMENT RELATES TO:

*Robert J. Swanston v. TAP Pharmaceutical Products Inc.;  
Abbott Laboratories; Takeda Chemical Industries, Ltd.;  
Zeneca, Inc.; AstraZeneca Pharmaceuticals LP;  
AstraZeneca LP; AstraZeneca PLC; Pharmacia  
Corporation; Pharmacia & Upjohn, Inc.; Monsanto  
Company; G.D. Searle; Johnson & Johnson; Ethicon  
Endo-Surgery, Inc.; Indigo Laser Corporation; Alza  
Corporation; Centocor, Inc.; Ortho Biotech; Bayer  
Corporation; Wyeth; Wyeth Pharmaceuticals; Amgen, Inc.;  
Immunex Corporation; Aventis Pharmaceuticals, Inc.;  
Aventis Behring L.L.C.; Hoechst Marion Roussel, Inc.;  
Baxter International Inc.; Baxter Healthcare Corporation;  
Boehringer Ingelheim Corporation; Ben Venue  
Laboratories, Inc.; Bedford Laboratories; Roxane  
Laboratories, Inc.; Bristol-Myers Squibb Company;  
Oncology Therapeutics Network Corporation; Apothecon,  
Inc.; Fujisawa Healthcare, Inc.; Fujisawa USA, Inc.;  
GlaxoSmithKline, P.L.C.; SmithKline Beecham  
Corporation; Glaxo Wellcome, Inc.; Schering-Plough  
Corporation; Warrick Pharmaceuticals Corporation; Sicor,  
Inc.; Gensia Sicor Pharmaceuticals, Inc.; Dey, Inc.; David  
Jett and Jane Doe Jett; Christopher Coleman and Jane Doe  
Coleman; Scott Hidalgo and Amanda Hidalgo; Michael  
Gendelman and Jane Doe Gendelman; Eddy James Hack  
and Jane Doe Hack; Kimberlee Chase and John Doe  
Chase; Janice M. Swirski and John Doe Swirski; Donna  
Tom and John Doe Tom; David Guido and Jane Doe  
Guido; Henry Van Mourik and Jane Doe Van Mourik; and  
Alan MacKenzie and Jane Doe MacKenzie; Does 1-50;  
ABC Corporations 1-50; and XYZ Partnerships and  
Associations 1-50*

Master File No.: 01-CV-12257-PBS

Judge Patti B. Saris

**OPPOSITION TO JOINT MOTION FOR ENTRY OF SCHEDULING ORDER**

Counsel for plaintiff in the case of *Robert J. Swanston v. TAP Pharmaceutical Products Inc., et al.*, ("Swanston") hereby oppose the entry of the scheduling order jointly proposed on August 12,

2003 by counsel for defendants and plaintiffs in three cases transferred to this Court.<sup>1</sup> See Joint Motion for Entry of Scheduling Order attached hereto as Exhibit "A." Although plaintiff's counsel in *Swanston* were not served with the motion, as was required of the joint movants, they nevertheless learned of the same by checking this Court's docket. Consequently, the undersigned now advise the Court of their opposition to the proposed Scheduling Order to the extent that it seeks to unduly complicate and overburden the hearing which this Court scheduled previously for the pending remand motion in *Swanston*.

At a hearing on July 22<sup>nd</sup> called by this Court, the undersigned counsel for plaintiff and counsel for the defendant TAP Pharmaceutical Products, Inc. ("TAP") and other defendants appeared<sup>2</sup>, at this Court's request, to discuss the appropriate manner in which to proceed with the distinct issues presented by the *Swanston* case. This Court will recall that it had concerns about *Swanston* because, unlike any other case pending in this MDL proceeding, *Swanston* involves claims against defendants, like TAP, and drugs, like Lupron®, that are a part of the parallel MDL proceeding, *In re: Lupron® Marketing Practices Litigation*, MDL No. 1430 (currently pending before Judge Stearns of this Court). In view of that fact, and other substantial differences presented by the procedurally-advanced *Swanston* action<sup>3</sup>, this Court set for hearing on October 9<sup>th</sup> the pending

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<sup>1</sup> The three cases are *Congress of California Seniors v. Abbott Labs., et al.*, Docket No. 03-CV-10216, *Rice v. Abbott Labs., et al.*, Docket No. 03-CV-11285, and *Thompson v. Abbott Labs., et al.*, Docket No. 03-CV-11286 (the "California cases").

<sup>2</sup> Although all the counsel in the courtroom did not identify themselves on the record, counsel for defendant GlaxoSmithKline did speak on the record at the end of the hearing.

<sup>3</sup> *Swanston* has been pending longer than this MDL proceeding as it was filed in March 2002 and was litigated in Arizona state court by defendants for over nine (9) months before they removed the action to federal court.

remand motion in *Swanston* to decide the threshold question of whether federal court jurisdiction existed before turning to the more complicated issues presented by *Swanston*. While the undersigned counsel for plaintiff had requested at the July hearing that the Court should schedule the *Swanston* remand for the same date as the remand hearing in the State cases, presently scheduled for September 18<sup>th</sup>, this Court indicated that, because the States' hearing would involve remand issues specific to the State cases, it did not want to unduly complicate that proceeding by adding the *Swanston* remand issues.

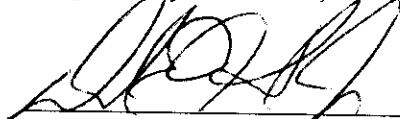
For the same reasons, this Court should not unduly complicate the October 9<sup>th</sup> hearing on the distinct *Swanston* remand issues by adding to the agenda the separate issues presented in the three California cases. While counsel for the plaintiffs in the California cases and defense counsel claim that adding the California issues to the *Swanston* hearing would be "in the interest of judicial efficiency," the undersigned respectfully disagree. First, the *Swanston* remand briefing was completed back in January of this year, and is ready for hearing and decision, while the briefing in the three California cases has yet to be accomplished. Second, as this Court observed at the July 22<sup>nd</sup> hearing, the remand issues presented by the *Swanston* case are difficult, as they involve issues of violations of the rule of unanimity (similar to those presented by the State of Minnesota) and the timeliness of defendants' removal, some nine months after the case was filed. Neither of these issues is involved in the California cases. Accordingly, the limited time reserved for the *Swanston* motion – with the hearing scheduled for 2:30 p.m. – should not be compromised, nor should the time necessary to argue the distinct issues in the California cases be compressed by attempting to jam the California issues into the October 9<sup>th</sup> *Swanston* hearing. Finally, defense counsel were present at the July 22<sup>nd</sup> hearing, and made the exact same request to have the *Swanston* case and the California

cases consolidated for one hearing. But, this Court rejected defendants' proposal and determined to allow the *Swanston* case to go forward separately for the above reasons, which were discussed fully on July 22<sup>nd</sup>. Consequently, since counsel present no new reason for re-visiting this issue, there is no reason for this Court to change its decision.

For these reasons, counsel for the plaintiff in *Swanston* respectfully request that the Court deny the Joint Motion for Entry of Scheduling Order to the extent it seeks to have the remand issues presented in the California cases resolved at the same time as the *Swanston* remand issues on October 9, 2003. Instead, the Court should allow the October 9<sup>th</sup> hearing to go forward on the *Swanston* issues alone, and should schedule for a separate hearing the remand motions in the California cases.

Dated: August 21, 2003

Respectfully submitted,



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**CO-LEAD COUNSEL FOR  
PLAINTIFF, ROBERT J. SWANSTON AND THE CLASS**

# **EXHIBIT “A”**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

----- x  
In Re: PHARMACEUTICAL INDUSTRY  
AVERAGE WHOLESALE PRICE  
LITIGATION  
THIS DOCUMENT RELATES TO:  
*Congress of California Seniors v. Abbott Labs.,*  
*et al.*, Docket No. 03 CV 10216  
*Rice v. Abbott Labs., et al.*, Docket No. 03 CV  
11285  
*Thompson v. Abbott Labs., et al.*, Docket No. 03  
CV 11286  
----- x

: MDL NO. 1456  
:  
: Master File No. 01-CV-12257-PBS  
:  
: Judge Patti B. Saris

FILED  
U.S. DISTRICT COURT  
DISTRICT OF MASSACHUSETTS  
SEP 1 2003  
JUDGE PATTI B. SARIS

JOINT MOTION FOR ENTRY OF  
SCHEDULING ORDER

Counsel for plaintiffs and defendants in the above-captioned actions respectfully move this Court for the entry of a proposed Scheduling Order (attached hereto as Exhibit A). Plaintiffs in the above-captioned actions have each moved this Court to remand these actions to the state courts where they were originally filed. Since these motions raise similar complex legal issues relating to federal jurisdiction, defendants propose to file a consolidated opposition to these motions. In addition, in the interest of judicial efficiency, the parties propose that these motions be scheduled for a hearing on October 9, 2003, the same date that the Court has scheduled a hearing on a similar motion to remand filed in *Swanston v. TAP Pharmaceutical Products, Inc.* Accordingly, the parties jointly request that the Court enter the proposed Scheduling Order.

08/12/2003 03:32 FAX 617 482 3003

HAGENS BERMAN LLP

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Respectfully Submitted,

ON BEHALF OF PLAINTIFFS

By: 

DATED: August 12, 2003

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ON BEHALF OF DEFENDANTS

By: 

DATED: August 12, 2003

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EXHIBIT "A" to Joint Motion for Entry of Scheduling Order



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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In Re: PHARMACEUTICAL INDUSTRY	:
AVERAGE WHOLESALE PRICE	:
LITIGATION	:
THIS DOCUMENT RELATES TO:	: MDL NO. 1456
<i>Congress of California Seniors v. Abbott Labs.,</i>	: Master File No. 01-CV-12257-PBS
<i>et al.</i> , Docket No. 03 CV 10216	: Judge Patti B. Saris
<i>Rice v. Abbott Labs., et al.</i> , Docket No. 03 CV	:
11285	:
<i>Thompson v. Abbott Labs., et al.</i> , Docket No. 03	:
CV 11286	:
-----	X

**SCHEDULING ORDER**

IT IS HEREBY ORDERED as follows:

1. Defendants shall file and serve a consolidated opposition to plaintiffs' remand motions by September 5, 2003. Defendants' consolidated opposition shall not exceed 30 pages.
2. Plaintiffs shall file and serve a consolidated reply, if any, by September 15, 2003. Plaintiffs' consolidated reply shall not exceed 20 pages.
3. Defendants shall file and serve a consolidated sur-reply, if any, by September 22, 2003. Defendants consolidated sur-reply shall not exceed 15 pages.
7. The Court shall hold a hearing on these motions on October 9, 2003, or such other date as the Court deems appropriate.

Dated: August \_\_, 2003

\_\_\_\_\_  
Patti B. Saris  
United States District Judge

MASSACHUSETTS DISTRICT COURT  
CLERK OF COURT  
SEP 12 10 47 AM '03

**CERTIFICATE OF SERVICE**

I certify that on August 12, 2003, a true and correct copy of the foregoing Joint Motion for Entry of Scheduling Order was served on all counsel of record by electronic service pursuant to Paragraph 11 of Case Management Order No. 2 by sending a copy to Verilaw Technologies for posting and notification to all parties.

Lucy Fowler

Lucy Fowler

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

**IN RE: PHARMACEUTICAL INDUSTRY AVERAGE  
WHOLESALE PRICE LITIGATION**

**MDL No. 1456**

**THIS DOCUMENT RELATES TO:**

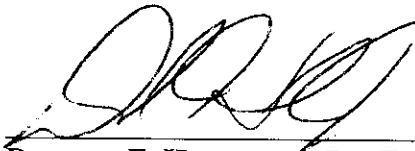
*Robert J. Swanston v. TAP Pharmaceutical Products Inc.;  
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Zeneca, Inc.; AstraZeneca Pharmaceuticals LP; AstraZeneca  
LP; AstraZeneca PLC; Pharmacia Corporation; Pharmacia  
& Upjohn, Inc.; Monsanto Company; G.D. Searle; Johnson  
& Johnson; Ethicon Endo-Surgery, Inc.; Indigo Laser  
Corporation; Alza Corporation; Centocor, Inc.; Ortho  
Biotech; Bayer Corporation; Wyeth; Wyeth Pharmaceuticals;  
Amgen, Inc.; Immunex Corporation; Aventis  
Pharmaceuticals, Inc.; Aventis Behring L.L.C.; Hoechst  
Marion Roussel, Inc.; Baxter International Inc.; Baxter  
Healthcare Corporation; Boehringer Ingelheim Corporation;  
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MacKenzie; Does 1-50; ABC Corporations 1-50; and XYZ  
Partnerships and Associations 1-50*

Master File No.: 01-CV-12257-PBS

Judge Patti B. Saris

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, August 21, 2003, a true and correct copy of the foregoing Opposition to Joint Motion for Entry of Scheduling Order, was served on all counsel listed on attached service list, via United States first class mail.



**DONALD E. HAVILAND, JR., ESQUIRE**

**PANEL SERVICE LIST (Excerpted from CTO-7); Docket No. 1456**  
**In re Pharmaceutical Industry Average Wholesale Price Litigation**  
*Swanston v. TAP Pharmaceutical Products, Inc., et al.*; C.A. No.: 2:03-62

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